

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
June 18, 2014

PETITIONER ¹)	
On behalf of STUDENT)	Case No: 2014-0158
)	
Petitioner,)	Date Issued: June 17, 2014
)	
v.)	Hearing Officer: Christal E. Edwards, Esq.
)	
District of Columbia Public Schools (DCPS))	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This is a Due Process Complaint ("DPC") proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed April 3, 2014, on behalf of the Student, who resides in the District of Columbia, by Petitioner (MOTHER), the Student's Parent ("Petitioner"), against Respondent, District of Columbia Public Schools ("Respondent"). This matter included an expedited claim regarding the student's recent suspension and whether or not Respondent denied the student a Free Appropriate Public Education ("FAPE") by not providing the student an Manifestation Determination Review ("MDR") meeting in connection with the suspension. The previous Hearing Officer held the Due Process Hearing on April 24, 2014 regarding the expedited claim and by Order dated May 8, 2014 the Hearing Officer found that Respondent had not denied the student a FAPE.

¹ Personal identification information is provided in Appendix A

This claim was dismissed and the remaining two claims, which are the subject of this proceeding moved forward.

On April 11, 2014, Respondent filed its Response, stating, *inter alia*, that Respondent has not denied the Student a FAPE. Respondent further stated that Student was evaluated and determined ineligible for special education and related services in May of 2009 and June of 2010 by School B. Additionally, once Petitioner, through Counsel, requested Respondent again evaluate Student for eligibility on December 9, 2013, Respondent completed a comprehensive psychological assessment and a functional behavior assessment (“FBA”) in January of 2014. The Multi-Disciplinary Team (“MDT”) Meeting was convened on January 28, 2014 and found student again ineligible for special education and its related services.

On or about May 23, 2014, the undersigned was reassigned this matter. As previously determined by two separate Prehearing Conference Summary and Order , dated April 21, 2014 and April 22, 2014, the parties agreed that five-day disclosures would be filed by May 29, 2014 and that the Due Process Hearing ("DPH") would be held on June 5, 2014.

A Resolution Meeting was held on April 24, 2014, which was not within the 15 calendar days of the filing of the DPC because of school closure/holidays – Spring break; however, it failed to resolve the DPC. The statutory 30-day resolution period ended on May 3, 2014. The 45-day timeline for this Hearing Officer Determination ("HOD") started to run on May 4, 2014 and will conclude on June 17, 2014.

The DPH was held on June 5, 2014 at the Student Hearing Office, 810 First Street, NE, , Washington, DC 20002. Petitioner elected for the hearing to be closed.

Petitioner's Disclosure Statement, dated May 29, 2014, consisted of a witness list of five (5) witnesses and documents P-1 through P-30. The Petitioner's Exhibits: P-1 through P-30 were all admitted without objections. The Petitioner presented the following witnesses in her case in chief:

- (a) Petitioner;
- (b) Petitioner's Senior Educational Advocate;
- (c) Paralegal;
- (d) Two different Administrators & Pastors, designated below as Administrator & Pastor A and Administrator & Pastor B. Administrator & Pastor A began to testify but Petitioner's counsel withdrew this witness on the record resulting in the withdrawal of this witness' testimony on the record.

Respondent's Disclosure Statement had previously been filed in the Expedited Hearing on April 21, 2014 and Respondent elected not to re-submit any further witnesses or documents regarding this matter. As previously submitted, Respondent's Disclosure statement consisted of a witness list of five (5) witnesses and documents P-1 through P-8. The Respondent's Exhibits: P-1 through P-8 were all admitted without objections. The Respondent presented the following witnesses:

- (a) Respondent's Administrator at School A; and
- (b) Respondent's School Psychologist.

On June 11, 2014, Petitioner and Respondent submitted written closing argument. And on June 12, 2014, Petitioner submitted a written rebuttal to Respondent's closing argument. Neither party requested or filed any other post hearing memorandum.

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”)

ISSUES AND RELIEF SOUGHT

The two issues to be determined in this Hearing Officer Determination are as follows:

Issue# 1: Whether Respondent denied Student a FAPE by failing to comply with its Child Find obligation to identify, locate and evaluate Student to determine Student’s need for special education as far back as September 2013.

Issue# 2: Whether or not Respondent denied student a FAPE by not finding the student eligible for special education services on January 28, 2014 at the Multi-Disciplinary Team (“MDT”) Meeting, despite the data providing her eligible for such services.

RELIEF REQUESTED

Petitioner requests the following relief:

- (1) A finding that Respondent denied the student a FAPE and student is eligible for an Individualized Education Plan (“IEP”);
- (2) An Order that within 10 school days of this Hearing Officer Determination, Respondent shall convene MDT team meeting to review the assessments, and develop an IEP for student and offer appropriate educational placement and location of services; and
- (3) Compensatory Education.

FINDINGS OF FACTS

After considering all of the evidence, as well as argument of counsel, this Hearing Officer's findings of facts are as follows:

- 1) Student is a resident of the District of Columbia. Petitioner is Student's mother.² (Exhibit P-1-1).
- 2) The Student has not been determined eligible for Special Education and its related services under the IDEA. (Exhibit P-1-1).
- 3) While Student attended at School A during the 2012/13 school year, the student received passing grades and was promoted to the seventh grade. (Petitioner, Exhibit P-8)
- 4) While student was attending School A, student received various short and long term suspensions and expulsions. (Exhibit P-4) Student also received a lot of student incident reports for various reasons such as fighting and disrupting the class. (Exhibit P-5) Because of student's behavior problem, Petitioner began the first week of school receiving numerous phone calls from the school about student and most calls requested Petitioner to pick up student from school. (Testimony of Petitioner, Exhibits P-4, P-5, P-6) The student's behavior problems consisted of student being defiant, disrespectful, and not following rules. (Testimony of Petitioner, Exhibits P-4, P-5, P-6) During the entire 2013/2014 school year at School A, student received a few "C" grades but mostly received a grade of "D" or "F" in all subjects. (Exhibit P-12)

² When citing to exhibits, the third range represents the page number within the referenced exhibit, in this instant, page 1.

- 5) In October of 2013, Petitioner requested a meeting with Assistant Principal for School A to discuss Student's behavior and suspensions, but did not request an evaluation for special education services at this time. (Testimony of Petitioner)
- 6) Because of the student's difficulty in school, Petitioner had student independently evaluated by outside firm A in September 2013. (Testimony of Paralegal, Petitioner, Exhibit P-21, Exhibit P-22)
- 7) On November 22, 2013, by email, on behalf of the Petitioner, Petitioner's representative/counsel sent a letter requesting student be evaluated for special education and its related services. (Testimony of Petitioner, Exhibit P-2-3) The specific evaluation requested was for an educational evaluation and a functional behavior assessment. (Exhibit P-2-3)
- 8) On December 9, 2013, Petitioner and Respondent met to discuss student's request for evaluations. (Testimony of Paralegal, Testimony of Petitioner's Senior Educational Advocate) During this meeting, Respondent agreed to performed FBA and comprehensive psychological evaluation only. (Testimony of Paralegal, Testimony of Petitioner's Senior Educational Advocate) Respondent also informed Petitioner that student needed to go through the Student Support Team ("SST") process before eligibility determination. (Testimony of Paralegal, Testimony of Petitioner's Senior Educational Advocate) However, the Petitioner did not agree. (Testimony of Paralegal, Testimony of Petitioner's Senior Educational Advocate)
- 9) Respondent agreed to evaluate the Student for Emotional Disturbance ("ED") & Learning Disability ("LD") and the evaluations were performed in January 2014. (Testimony of Respondent's Psychologist) Additionally, Student was making

progress with SST plan but Student was not giving the behavior rating forms to parent/Petitioner. (Testimony of Respondent's Psychologist) During the eligibility meeting on January 28, 2014, the results for the assessments were discussed with Petitioner. (Testimony of Respondent's Psychologist) Respondent found Student was capable of performing and had ability to do well and Student was not eligible for special education and its related services. (Testimony of Respondent's Psychologist, Exhibits R-2, R-3, R-4, R-5, R-6, R-7) Respondent consider other possible stressors in Student's life such as the death of her father, the conflict in household between mother and grandmother, and the recent fire of home which forced the family to move in with grandmother. (Testimony of Respondent's Psychologist)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer is as follows:

Purpose of the IDEA

The IDEA is intended "(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected..." 20 U.S.C. §1400(d)(1); *accord*, DCMR §5-E3000.1.

Burden of Proof

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of

proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. In a Special Education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S.49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *See also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

FAPE

The IDEA requires that all students be provided with a free appropriate public education ("FAPE"). FAPE means:

special education and related services that -

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

Procedural Violations of IDEA

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

20 U.S.C. §1414(f)(3)(E). *See also*, 34 C.F.R. §300.513(a); *accord*, *Lesesne v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (B.C. Cir. 2006).

Analysis

Issue #1: Whether Respondent denied Student a FAPE by failing to comply with its Child Find obligation to identify, locate and evaluate Student to determine Student's need for special education as far back as September 2013.

Respondent has a responsibility and obligation to adhere to the regulations and guidelines set forth in IDEA. In adherence to such, Respondent must have procedures in place to ensure that all children with disabilities residing within the District of Columbia, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located and evaluated and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services. And, this obligation extends to children who are *suspected* of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. 300.111, 5 D.C.M.R. E-3002.1(d).

Child with a disability means a child who is evaluated as having one of the qualifying disabilities under the IDEA, and who, by reason thereof, needs special education and related services. 34 C.F.R. 300.8. Special education means specially designed instruction, to meet the unique needs of the child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability, and ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. 300.39.

Petitioner failed to meet her burden of proof by a preponderance of the evidence that Respondent failed in its affirmative Child Find obligation to identify, locate and evaluate Student as far back as September 2013. There was insufficient evidence offered by Petitioner that there was a basis, prior to the parent's request for evaluation on November 22, 2013, that Respondent was or should have been on notice to evaluate Student under its "Child Find" obligations. In addition, all parties agreed that Student did not exhibit this type of behavior in the prior school year, 2012/13, and all teachers mentioned that Student was not like this last year.

"Child Find" is DCPS' affirmative obligation under the IDEA: "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process. Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE." *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2008).

"DCPS child-find obligations [to evaluate the student] are triggered 'as soon as a child is identified as a potential candidate for services,'" *Long*, 780 F. Supp. 2d at 57 (citing *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 16 (D.D.C. 2011)). *Integrated Design and Elec. Acad. Pub. Charter Sch. v. McKinley*, 570 F. Supp. 2d 28, 34 (D.D.C. 2008) (a school is obligated to evaluate a student once that student is "suspected of having a disability").

The Petitioner made a written request to have the student evaluated on November 22, 2013. Within eleven school days, Respondent held a meeting on December 9, 2013 to discuss the request for evaluation and Respondent obtained the consent to evaluate from Petitioner. (Testimony of Petitioner's Paralegal and Senior Education Advocate, Testimony of Petitioner) During this meeting, team members discussed the Students' current academic and behavior problems, which included several student incident reports for being disruptive and one for fighting. Also, since the beginning of the 2013/14 school year, the Student had received a total

of four short-term suspensions on the following dates: 9/30/2013; 10/3/2013; 10/31/2013; and 11/27/2013. Respondent agreed to performed FBA and Comprehensive psychological evaluation only, which was completed on January 10, 2014. (Exhibit R-6 and R-7) Respondent then convened a meeting on January 28, 2014 to review the evaluations. (Testimony of Respondent's Psychologist, Exhibits R-5, R-6, R-7) Therefore, I agree with Respondent, the Student was *not* denied a FAPE because Respondent did not fail to comply with its Child Find Obligations.

Issue #2: Whether or not Respondent denied student a FAPE by not finding the student eligible for special education services on January 28, 2014 at the MDT Meeting, despite the data providing her eligible for such services.

Pursuant to 34 C.F.R. 300.308 (a)(1), the determination of whether a child suspected of having an SLD is a child with a disability as defined in 34 C.F.R. 300.8 must be made by the child's parents and a team of qualified professionals, which must include:

- (a) (1) The child's regular teacher; or
 - (2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or
 - (3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and
- (b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

To be found eligible for ED, the Student must exhibit one or more of the following characteristics *over a long period of time* and to a *marked degree* that adversely affects a child's educational performance:

- (i)
 - (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

Pursuant to 34 C.F.R. 300.308(b), the team must also include at least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher. See 20 USC 1221 through 20 USC 1223; and 20 USC 1401(30); 20 USC 1414(b)(6).

The public agency must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty. 34 C.F.R. 300.310(a).

In this instant case, the team reviewed the relevant evaluation information, the definition in IDEA 300.8 and 5DCMRE 3001.1 and the state policies around specific eligibility criteria. (Testimony of Respondent's Psychologist, Exhibit R-2) Further, the team used assessment procedures that were valid for the purposes intended and valid for the student. 5DCMRE 3006.5(c) (Testimony of Respondent's Psychologist, Exhibit R-2) Respondent evaluated Student for the disability classification of Specific Learning Disability and /or Emotional Disturbance and found that Student did not meet the criteria for such disability classifications. (Testimony of Respondent's Psychologist, Exhibit R-2).

Petitioner did not meet her burden of proof by a preponderance of the evidence that Respondent failed to find Student eligible for special education services during the MDT on January 28, 2014.

Respondent is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about Student, including information provided by the parent that may assist in determining whether the child is a child with a disability. 34 C.F.R. 300.304(b)(1). Respondent credibility testified that the Student was observed in 3 classrooms (Science, Math, and Social Studies), observation of Student during SST meetings, IQ assessments, Wechsler Intelligence Scale for Children (WISC-IV), Woodcock-Johnson Tests of Achievement, Third Edition, Behavior Assessment system for Children, Second Edition, and reviewed the FBA and BIP. I find that Respondent did not deny the Student a FAPE by not finding the Student eligible for special education services on January 28, 2014 at the MDT Meeting.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

(1) All requested relief by Petitioner in this matter is DENIED.

IT IS SO ORDERED.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

06/17 /14
Dated

Christal E. Edwards /s/
Christal E. Edwards, Esq.
Hearing Officer